

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

CORRECTED COPY

77-1175

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

MIGUEL RUSSO, et al.,

Appellant.

*On Appeal from a Judgment of Conviction
in the United States District Court for
the Eastern District of New York*

APPELLANT'S BRIEF

NANCY ROSNER
Attorney for Appellant Russo
401 Broadway
New York, New York 10013
(212) 925-8844

*J. Jeffrey Weisenfeld,
Of Counsel*

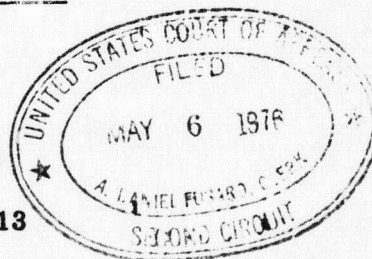


TABLE OF CONTENTS

	<u>Page</u>
Statement of Issues	1
Preliminary Statement	2
Statement of Facts	2
POINT I - The Refusal Of The Court At Russo's First Trial To Accept Russo's Waiver Of A Unanimous Verdict, Of A Jury Trial, And Of A Jury Of Twelve Was Error And Accordingly, So Was The Grant Of A Mistrial	8
POINT II - The Government's Use Of Perjured Testimony At Trial And The Failure To Properly Disclose Prior Testimony Of A Witness Was Error And Requires Remand For An Evidentiary Hearing	28
POINT III - Pursuant to Rule 28(i) Of The Federal Rules Of Appellate Procedure, Appellant Hereby Adopts And Incorporates By Reference All Applicable Arguments Raised By Co-Appellant	33
Conclusion	33

CASES CITED

	<u>Page</u>
Alcorta v. Texas, 355 U.S. 28 (1975)	31
Andres v. United States, 333 U.S. 740, 748 (1948).	20
Apodaca v. Oregon, 406 U.S. 404 (1972)	10
Blackledge v. Perry, 417 U.S. 21 (1974)	13
Brady v. United States, 397 U.S. 742 (1970)	14
Commonwealth v. Bartolomucci, 362 A.2d 234, 238 (Sup. Ct. Pa. 1976)	16
Davis v. Alaska, 415 U.S. 308 (1974)	32
Duncan v. Louisiana, 391 U.S. 145 (1968)	21
Faretta v. California, 422 U.S. 806, 819 n. 15 (1975)	22
Fournier v. Gonzalez, 269 F.2d 26, 29 (1st Cir. 1959)	20
Giglio v. United States, 405 U.S. 150 (1971)	30
Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953)	20
Illinois v. Somerville, 410 U.S. 458 (1973)	27
Larrison v. United States, 24 F.2d 82, 87 (7th Cir., 1928)	30
Levin v. United States, 5 F.2d 598 (9th Cir. 1925)	13
McMann v. Richardson, 391 U.S. 759 (1970)	14
Menna v. N.Y., 423 U.S. 61 (1975)	15
Parker v. North Carolina, 397 U.S. 790 (1970)	14
Patton v. United States, 281 U.S. 276, 312 (1930).	25
People v. Johnson, 240 N.W.2d 729 (Sup. Ct. March, 1976 cert. den. 20 Cr.L. 4062)	16

	<u>Page</u>
People v. Markham, 245 N.W. 2d 41, 44-45 (Sup. Ct. Mich.)	16
Singer v. United States, 380 U.S. 24 (1965)	22
Tollett v. Henderson, 411 U.S. 258 (1973)	14
Torres v. Delgado, 510 F.2d 1182, 1183 (1st Cir. 1975)	20
United States v. Dinitz, 95 S.Ct. 1075, 1079 (1976)	25
United States v. DiSilvio, 520 F.2d 247 (3d Cir. 1975) cert. den. 96 S.Ct. 447	27
United States v. Estremera, 531 F.2d 1103 (2d Cir. 1976), cert. den. 96 S.Ct. 2184	27
United States v. Gentile, 525 F.2d 252 (2d Cir. 1975) cert. den. 425 U.S. 903	27
United States v. Glover, 506 F.2d 291 (2d Cir. 1974)	27
United States v. Grasso, - F.2d - , slip op. 2247, 2256 (2d Cir. 3/9/77)	26
United States v. Jorn, 400 U.S. 470, 485 (1971) ..	27
United States v. Joyce, 499 F.2d 9 (7th Cir. 1974) cert. den. 419 U.S. 1031	26
United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1973)	31
United States v. Kramer, 355 F.2d 891 (7th Cir. 1966), cert. den. in part and granted in part 384 U.S. 100	23
United States v. Maybury, 247 F.2d 899 (2d Cir. 1960)	20
United States v. Pacente, 503 F.2d 543, 552 (7th Cir. 1974) cert. den. 95 S.Ct. 623	21
United States v. Perez, 9 Wheat (22 U.S. 579, 580 (1824)	27

	<u>Page</u>
United States v. Reeves, 293 F.Supp. 213 (D.C.D.C. 1968)	13
United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975)	31
United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974) cert. denied 420 U.S. 962 (1975)	31
United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975)	30
United States v. Vega, 447 F.2d 698 (2d Cir. 1971)	10
Wade v. Hunter, 336 U.S. 684, 689 (1949)	26
Walker v. Florida, 397 U.S. 387 (1970)	15

STATUTE CITED

21 U.S.C. §173, 174	2
---------------------------	---

OTHER AUTHORITIES

Appellate Review of Constitutional Infirmities Notwithstanding A Plea of Guilty, 9 Houston L.Rev. 305, 314 (1971)	15
Moore's Federal Practice, Vol. 8A par. 31.02(1)	20

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

77-1175

-against-

MIGUEL RUSSO, et. al.,

Appellant.
-----X

Statement of Issues

I

Whether the refusal of the court at Russo's first trial to accept Russo's waiver of a unanimous verdict, of a jury trial, and of a jury of twelve was error, and accordingly, whether the grant of a mistrial was also error?

II

Whether the government's use of perjured testimony at trial and the failure to properly disclose prior testimony of a witness was error requiring remand for an evidentiary hearing?

PRELIMINARY STATEMENT

This is an appeal from a judgement of conviction in the United States District Court for the Eastern District of New York, Hon. Jacob Mishler, Chief District Judge.

Appellant Russo was found guilty, after a trial by jury, of conspiracy to violate the Federal narcotics laws.

21 USC§§173,174. On March 4, 1977, Russo was sentenced to a twenty year term of imprisonment and a \$20,000 fine.

On February 18, 1977, the Hon. Jacob Mishler denied appellant's motion to dismiss the indictment on the ground the court was without jurisdiction of the offense charged because of the prohibition against twice being placed in jeopardy.

STATEMENT OF FACTS

Government's Case

In early 1965, Michel Nicoli, a citizen of France living in Buenos Aires, Argentina as a fugitive from the French authorities, became acquainted with Luis Gomez Aguilera, a Bolivian also living in Buenos Aires (92).^{*} Nicoli learned from Aguilera that the Bolivian had access to cocaine and if Nicoli was interested, Aguilera would sell it to him. Nicoli was interested and even had a friend in Marseille, France who would buy the cocaine if Nicoli transported it there, but Nicoli did not have the necessary funds (93).

A short time later, still in early 1965, Nicoli made the acquaintance of a fellow Frenchman named Francois Rossi, who was also living in Buenos Aires at the time. When Nicoli mentioned

^{*} References are to the typewritten minutes of trial.

the cocaine deal to Rossi, Rossi was interested but also lacked the money (five to six thousand dollars) necessary to initiate the deal (94-95). Later in the spring of 1965, Nicoli and Rossi met another Frenchman living in Buenos Aires, appellant Francois Chiappe. When they explained the transaction to Chiappe, he expressed interest and indicated he could supply the money, which he did (99).

Chiappe added a second phase to Nicoli's plan. The new idea was to sell the cocaine to Nicoli's friend and use the proceeds to buy heroin in France, through Chiappe's nephew, for resale in the United States (100-01). All three agreed to this and in approximately June, 1965, Nicoli bought the cocaine. He carried one and a half kilograms, around his midsection, to France.* In Paris, he met Chiappe's nephew at a pre-arranged place and they, along with a friend of the nephew, went to Marseille to sell the cocaine. They used the proceeds to buy two and a half kilos of heroin, which Nicoli took back to Buenos Aires (104-05).

On July 17, 1965, Rossi, using a fraudulent French passport, transported the heroin from Argentina to New York City. He then sold it to a Frenchman from Buenos Aires (107,110).

In approximately November, 1965, a second transaction occurred. Again, Nicoli transported cocaine to France, sold it and purchased five kilos of heroin (128-31). He returned to Buenos Aires with half of it, the other half being transported there by the friend of Chiappe's nephew. On November 17, 1965, Rossi and Nicoli transported the heroin to New York, each using

* Nicoli travelled under a phony name and passport in the name of Ricardo Sunde, an Argentinian.

fraudulent passports. In New York, they sold the heroin and returned to Buenos Aires to divide the proceeds (133-36).

The next transaction was to be larger and would be brought into the United States with the aid of Joseph Alfonsi, a Frenchman who was a seaman aboard a French ship. Chiappe contacted him when he was in Buenos Aires and he met with Chiappe, Rossi and Nicoli. Alfonsi agreed to transport 5 kilos of heroin from Paris (Le Havre) to Buenos Aires. Thereafter, Nicoli took one and a half kilos of cocaine to France and gave the money to Pierre Massot, who bought 7 Kilos of heroin. Nicoli took 2 kilos to Argentina with him, but Alfonsi was caught, on February 22, 1966, with his five kilos by the French police. Pierre Massot was also arrested at this time. (142-48)

Later that year, in November, Nicoli was arrested in Buenos Aires and incarcerated until January of 1967. On his release, Rossi and Chiappe told him that during his incarceration they had made another successful trip in December, 1966, and Nicoli's share of the proceeds was waiting for him. (151)

Another transaction was under way soon after Nicoli's release. Chiappe had already arranged for nine kilos of heroin to be delivered from France to Madrid, Spain. Three couriers were used-Rossi, Nicoli and Giovanni Parisio, an Italian living in Buenos Aires known to the other three. They met in Madrid in approximately February of 1967 and received the heroin (159-60). This time they flew to Montreal, took the train to Port Huron, Michigan, and from there to Chicago and New York.* The transaction was completed successfully and they returned to Buenos Aires with the proceeds. (163)

* Rossi and Nicoli again traveled under fraudulent passports.

In approximately March of 1967, Nicoli, Rossi and Chiappe were given the name of a potential courier by a mutual friend who also lived in Buenos Aires, appellant Miguel Russo. The new courier was Elio Paolo Gigante, a steward for Avianca Airlines. (174). Nicoli, Rossi, and Chiappe approached Gigante and he indicated a willingness to assist them. The plan was for Gigante, on his next trip to Paris, to contact Chiappe's friend in Paris and receive five kilos of heroin. This was to be transported to New York, where Nicoli would wait to receive and sell it (177-78). This trip was successful and Gigante received \$5,000 for his efforts. Nicoli paid him in Bogota, Colombia and then returned to Buenos Aires to split the proceeds with Rossi and Chiappe (191-92).

Subsequently, they asked Gigante to make another trip in June, 1967 with approximately 14 kilos of heroin. He agreed to do it. This time, due to its size, Nicoli and Chiappe waited at Madrid, the next stop on Gigante's flight after Paris, to check that everything went according to plan. After the "all clear" signal from Gigante was received, Nicoli went to New York to meet him, again using a fraudulent passport. But, Gigante did not get off the plane (202). Nicoli called Gigante's home in Bogota. Gigante told him "I am sick", which Nicoli took to mean he had been arrested (202a). Nicoli quickly left New York, catching a flight to Madrid. He called Chiappe and explained what happened. Chiappe told him to stay there and call in a few days.

When Nicoli again spoke with Chiappe, Chiappe confirmed Nicoli's fears, but told him that Miguel Russo was going to Bogota to see if the heroin could be recovered. At this point

Nicoli returned to Argentina (203).

During July of 1967, Chiappe, Nicoli and Rossi received the news that Russo was successful and would transport the heroin to New York via Miami. Nicoli and Rossi met him in New York in early August, 1967. Russo gave them thirteen of the fourteen kilos seized. He told them he had to bribe Colombian law enforcement officials to obtain the heroin. This cost \$10,000. The remaining kilo had to stay in Bogota in order to avoid detection that a substitution had been made for the bulk of the heroin (213,215).

When the heroin was sold, Nicoli paid Russo for his efforts and paid him the \$10,000 for the bribe. Nicoli returned to Buenos Aires and Russo went to Bogota (216).

In October, 1967 another trip was planned and Nicoli, Chiappe and Rossi asked Russo to assist by recruiting couriers. Russo agreed and coordinated the operation. He went to Paris and received 9 kilos of heroin and distributed it to the couriers, who brought it to Miami. Russo then took the heroin to Nicoli in New York. Nicoli sold the heroin and met Russo and the couriers in Miami, where they waited to be paid. They all then returned to Buenos Aires on the same plane (221,227-32).

Chiappe, Rossi, and Nicoli now asked Russo to handle another trip involving 23 kilos of heroin, again using the Canadian route. Russo was supposed to handle the entire U.S. end of the operation, but the couriers were all arrested in Montreal on December 13, 1967 (236-38).

In early February, 1968, Russo introduced Nicoli to a potential courier, an Argentinian commercial airline pilot.

Nicoli, Rossi, and Chiappe agreed to try another trip. The pilot was given three kilos of heroin and told to meet Nicoli, traveling under a phony passport in the name of Abraham Enrique Goldman, in Miami. Nicoli was stopped by U.S. Customs, but released since he was not carrying narcotics. He then went to New York and told his potential buyer what had happened and his fear he was being watched by law enforcement officials. The buyer sent another person to Miami to pick up the heroin and paid Nicoli, who returned to Argentina on February 16, 1968 to pay Russo and split the proceeds with Rossi and Chiappe (279-87, see also A449-58).*

* References preceded by "A" refer to pages of appellant Russo's appendix.

POINT I

THE REFUSAL OF THE COURT AT RUSSO'S FIRST TRIAL TO ACCEPT RUSSO'S WAIVER OF A UNANIMOUS VERDICT, OF A JURY TRIAL, AND OF A JURY OF TWELVE WAS ERROR AND ACCORDINGLY, SO WAS THE GRANT OF A MISTRIAL.

Miguel Russo was charged, under indictment number 73 Cr. 164 with conspiracy to violate the federal narcotics laws. On July 7, 1976, trial before Hon. Thomas C. Platt began, and at about 11:30 a.m. on Friday, July 9th, the case was given to the jury (A17). * The jury deliberated until 6p.m. but could not reach a verdict and the case was adjourned until Monday, July 12, 1976. On the morning of the 12th, the jury resumed its deliberations. At the outset of the afternoon session on the 12th, the jury sent the court a note indicating that they were hopelessly deadlocked. (A17). A few minutes later, at about 2:30 p.m., the court gave the jury an Allen-type charge, at the end of which Judge Platt stated: "Take another half hour or hour or so and see what you can do." (A19). After the jury was excused, defense counsel objected to the time limit set by the court on the jury deliberations because the time limit undercut the effect of the charge. (A19-20) During the colloquy had on the objection, defense counsel stated that she would not consent to a mistrial because the jury had not been deliberating that long. (A20). The court agreed to "push" the jury and not let them go in an hour (A20). At 3:00 p.m., **the jury sent out another note indicating that no verdict had been reached (A21). Immediately thereafter, both the

* References preceded by "A" refer to appellant Russo's appendix.

** Interestingly, this note was sent out just one-half hour after the Allen charge was given. The jury must have taken the words of the court literally and deliberated for just a half hour. This was pointed out to Judge Platt by defense counsel (A39).

government and defense counsel agreed to accept a majority verdict (A21-2). While the consent of counsel was phrased in terms of a waiver of a right to a unanimous verdict, the court outlined a different procedure. "He can waive his right to a jury trial and be tried by me. I'd be guided by whatever the outcome is." (A21-2). After consulting with her client, defense counsel informed the court that he agreed to the procedure outlined by the court (A23). The court then conducted a full inquiry of Mr. Russo to determine that he was, indeed, making an intelligent and knowing decision to waive his right to a jury trial. (A23-5).

While the court at some points in its inquiry of Russo posed the waiver in terms of a unanimous jury verdict, the procedure outlined by the court did not consist of such a waiver, rather it consisted of a waiver, under Rule 23 of the Federal Rules of Criminal Procedure, of a jury trial upon the court's promise that in reaching the non-jury verdict it would be bound by the majority vote of the jury. (A23-7).

In essence, what you would be doing would be saying to this court that we could take a head count, of the jury, and if the majority, if seven or more came in for either conviction or acquittal you would then leave it in this Court's hands to declare the verdict as if there had been no jury and I would act in accordance with that head count.

Do you understand that? (A25)

Russo agreed to waive his right to a jury trial under the circumstances outlined to him by the Court (A25). The Court continued the inquiry, determined that the waiver was

knowing and intelligent, and therefore, that the waiver was acceptable.*

The Court then indicated that it wished such waiver to be in writing (A28). After discussing the necessity for a written waiver, the Court handed counsel a waiver form and indicated that someone should "type it up or write it better."

At this point, the prosecutor requested permission to speak to Mr. Trager to make sure he "agreed with me..." (A29) In the prosecutor's absence, the Court informed defense counsel that it had been called to his attention that, as regards federal courts, the requirement of jury unanimity was jurisdictional and could not be waived. The Court read this statement of the law from Moore's Federal Practice, which in turn, relied upon the holding in Apodaca v. Oregon, 406 U.S. 404 (1972) (A29-32).

After the Court had expressed its misgivings about the legality of waiving a unanimous verdict, both the prosecutor and defense counsel attempted to work out a procedure which would satisfy the Court. In an attempt to avoid a mistrial, defense counsel suggested that the Court follow the procedure set out in United States v. Vega, 447 F.2d 698 (2d Cir. 1971); namely, that a count be made of how the jurors stood (without indicating whether the majority was for acquittal or conviction) and the minority jurors excused. It was pointed out to the Court that the Vega procedure was constitutionally sound, for it did not involve a waiver of a unanimous verdict, but only a waiver of the right to a jury of twelve; such waiver being both constitutionally sound and specifically permitted by Rule 23 (b) of the Federal Rules of

* The Court phrased the waiver as a waiver of "...your rights as to a unanimous verdict by a jury of twelve..." (A27)

Criminal Procedure (A33-5).

After hearing defense counsel, the Court turned to the prosecutor and stated that if the government accepted the offer of counsel it would be falling into a "trap" (A35). The prosecutor and defense counsel indicated that this "trap", if one existed, could be avoided,* but the Court stated:

My opinion is the best thing
to do under the circumstances
is call them in and see if
still hung call a mistrial
and re-try it. (A36).

The Court said it would not foreclose the government from accepting the defense suggestion, but the government then decided that it would not enter into such an agreement (A36-9).

The Court then informed counsel that he was calling the jury back and if they still felt they could not reach a verdict, a mistrial would be granted. Defense counsel objected to a mistrial and requested another Allen charge, but without any time limit included (A39). The Court indicated that it would bring the jury back the following day and re-read the Allen charge previously given to them (A39-40).

At 4:30 p.m., the jury returned to the courtroom and Judge Platt told them to continue to deliberate (A40). At 5:00

* THE COURT: If you consent to the procedure and it backfires, you have a double jeopardy problem.

MR. SCHLAM: I think under the circumstances, with the consent of the defendant..

THE COURT: It may be a heads-you-win,[sic] tails-you-lose. You may not be able to try it again even if you lose. You have a double jeopardy question.

MS. ROSNER: He can waive double jeopardy. He can do that on the record right now, if there is any question about it. I am not attempting to gain unfair advantage (A35-6).

Thus it is clear, that defense counsel was willing to waive any possible impediment to the implementation of a procedure to avoid the necessity of a mistrial.

p.m. the jury was again brought into the courtroom and Judge Platt asked the foreman if there was any hope of reaching a verdict. The foreman responded that the chances were slim even if the jury deliberated the following day (A43-4). After hearing this, the Court, over the objection of the defense, granted a mistrial.

After the mistrial had been granted, the jury was polled and it was determined that the jury's last count was eight for acquittal and four for conviction. (A44-5).

Russo requested an immediate retrial to avoid the intolerable pressure of a long wait for his second trial. The government refused to grant an immediate retrial, stating:

Your Honor, in light of the statement by the jury we would respectfully request a little bit of time in order to see if there is anything further that we may be able to present in a re-trial in support of the charges against the defendant. (A44-5)
This is an important case and we request that we be given time consistent with the Speedy Trial rules in order to see whether evidence can be developed and presented which would strengthen the government's case. (A45)

The second trial was not held until the co-defendant, Chiappe, was available. Russo and Chiappe were tried before the Hon. Jacob Mishler and a jury and were convicted. On February 18, 1977, Judge Mishler orally denied appellant Russo's motion to dismiss the indictment on the ground that the court had no jurisdiction of the offense charged because of the prohibition against twice being placed in jeopardy (A59-66).

A.

RUSSO'S CLAIM OF DOUBLE JEOPARDY IS
PROPERLY RAISED AT THIS TIME.

In this case, no motion to dismiss the indictment was made prior to the completion of the second trial. Under the case law prior to the Supreme Court's decision in Robinson v. Neil, 409 U.S. 505 (1973) and Blackledge v. Perry, 417 U.S. 21 (1974) this failure to raise the issue would have been considered an implied waiver of the right. E.g. Levin v. United States, 5 F.2d 598 (9th Cir. 1925); In the Matter of JAH, 315 A.2d 825 (D.C. Ct.App. 1974); United States v. Reeves, 293 F. Supp. 213 (D.C.D.C. 1968). However, it is clear that beginning with Robinson v. Neil, *supra*, the right to not be placed in jeopardy twice has been distinguished from other constitutional rights which are waived by a plea of guilty or a second trial.

In Robinson, a unanimous court distinguished double jeopardy from other constitutional rights:

While the guarantee [double jeopardy]...is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial.

409 U.S. at 509.

Shortly after Robinson, the Supreme Court applied the Robinson double jeopardy reasoning to find that a plea of guilty did not foreclose an accused from raising a due process right which arose prior to his taking a plea. Blackledge v. Perry, 417 U.S. 21 (1974). The Court first distinguished the due process right* from those rights which under Brady v. United States, 397

* Justice Renquist states, in his dissent, that in reality Blackledge is a double jeopardy case. 417 U.S. 21, 35.

U.S. 742 (1970); McMann v. Richardson, 391 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970) and Tollett v. Henderson, 411 U.S. 258 (1973), are waived by a guilty plea or, as here, a second trial.

Although the underlying claims presented in Tollett and the Brady trilogy were of constitutional dimension, none went to the very power of the State to bring the defendant into court to answer the charge brought against him... In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Supreme Court. Unlike the defendant in Tollett, Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S. at 266, 267, 93 S.Ct. 1602, 1608. Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge.

417 U.S. at 30.

The Court then stated:

While our judgement today is not based upon the Double Jeopardy Clause, we think that the [Robinson double jeopardy clause] language aptly describes the due process right upon which our judgement is based.

The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Supreme Court proceedings through a federal writ of habeas corpus.

417 U.S. at 31.

In Menna v. New York, 423 U.S. 61 (1975) (per curiam) the Court, citing Blackledge, rejected the state's reliance on Tollett and held a guilty plea did not waive a double jeopardy defense.

Where the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.

423 U.S. at 63.

Thus, the Supreme Court has recognized the distinction between jurisdictional and non-jurisdictional constitutional rights and further, that jurisdictional rights cannot be waived by a mere failure to raise the claim before the plea or before the second trial begins.* See, Mullady, Appellate Review of Constitutional Infirmities Notwithstanding a Plea of Guilty, 9 Houston L.Rev. 305, 314 (1971).

Moreover, double jeopardy is a jurisdictional right which goes to the very power of the government to bring the accused to trial and is not waived by a plea, even a plea entered before raising a double jeopardy claim. Blackledge v. Perry, supra; Robinson v. Neil, supra**; People v. Johnson, 240 N.W.2d 729 (Sup. Ct. March,

*This is quite distinct from an affirmative, intentional and knowing waiver of a right.

**In Blackledge, defendant was convicted of a misdemeanor. He appealed and, under North Carolina law, received a trial de novo in a higher court. After the filing of the notice of appeal but prior to the de novo trial, the prosecutor secured an indictment covering the same conduct as the misdemeanor indictment. Some months later, Perry raised for the first time his claim of double jeopardy in a federal habeas corpus proceeding.

In Robinson, Robinson was convicted in a municipal court for assault. He was later indicted by the state for the same charge. He pleaded guilty to those charges. Several years later he first raised the claim of double jeopardy in a state habeas corpus proceeding. While it is true, that there was a change in the law of double jeopardy as regards the states and the doctrine, of "dual sovereignty" (Benton v. Maryland, 395 U.S. 784 (1969) and Walker v. Florida, 397 U.S. 337 (1970)), the

1976 cert. den. 20 Cr.L. 4062; People v. Markham, 245 N.W. 2d 41,44-45 (Sup.Ct. Mich) (concurring opinion); cf. Commonwealth v. Bartolomucci, 362 A.2d 234, 238 (Sup.Ct.Pa. 1976).

In conclusion, where the asserted right, as here, would, if sustained, prevent a trial from taking place, that right is not waived either by a plea of guilty or a plea of not guilty followed by a second trial.

Supreme Court did not rely on this change in law to excuse waiver, but rather found no waiver solely from the nature of the right against being placed in jeopardy.

In Menna, the claim of double jeopardy was first raised on appeal.

B.

THE REFUSAL OF THE COURT TO
ACCEPT RUSSO'S WAIVER OF A
UNANIMOUS VERDICT, OF A JURY
TRIAL, AND OF A JURY OF TWELVE
WAS ERROR AND ACCORDINGLY, SO
WAS THE GRANT OF A MISTRIAL.

When it became apparent that the jury might not be able to reach a verdict, the government and the defense attempted to find a way to avoid the necessity of a re-trial. Three procedures to effectuate a verdict were discussed; they were: 1) That Russo would waive his right to a unanimous verdict; 2) That Russo would waive his right to a jury, upon the understanding that the judge, acting as the trier of fact, would be bound by the vote of the majority of jurors, and 3) That Russo would waive his statutory right to a jury of twelve, in that the minority jurors would be excused and the majority would then be unanimous. The first procedure was suggested by the defense and the government; the second by the Court; and the third by the defense.

Despite the desire of the parties to avoid a re-trial, the actions of the Court, predicated on an erroneous interpretation of the law, frustrated the implementation of a procedure which would have insured a verdict.

Each of the three procedures were constitutionally sound and the failure of the court of approve any of them and the conditioning of their implementation upon the consent of the government was error. In this posture, jeopardy attached and Russo could not be retired.

1. The Suggested Procedures for Waiver of a Unanimous Jury Verdict, of a Jury of Less Than Twelve, and of a Jury Trial were all Constitutionally Permissible.

The first suggestion to avoid a mis-trial was made by both prosecutor and defense counsel when they informed Judge Platt that Russo would waive his right to a unanimous verdict. Everyone involved was desirous that the case not be retried. The prosecutor stated "if it is lawful, Your Honor, we will go for it."

(). The Court responded, "I don't see how it can do any wrong".

(). Thus, the intent to finish this case the first time around is clear. In fact, the attempt to obtain a verdict went so far as to include a searching inquiry of Russo which persuaded the Court that the defendant's act was knowing and voluntary.

Having been advised as to your rights to a unanimous verdict by a jury of twelve, I will accept your waiver thereof and your consent to a majority verdict by this jury which ever way it comes out.

I will, however, in an excess of caution, require that the consent and waiver be in writing. ().

2. The Failure of the Court to Accept Russo's Consent and Waiver was Error.

After repeatedly warning the prosecution that it was walking into a trap if it consented to Russo's waiver, the Court stated that it would still accept the waiver if the government agreed. Thus, the ultimate reason for rejecting the waiver was the government's refusal to consent to it.

Apparently, the government's change of heart was the product of Judge Platt's repeated warnings about the dire consequences of acceptance.* Throughout, the prosecution wanted to

* It is respectfully suggested that these warnings were incorrect and unnecessary both because of the propriety of the suggested waivers and because Russo was willing to waive any defects in the procedure which were troubling the court.

accept the waiver but when faced with a court that told them they would be fools to accept, the about-face was inevitable.

However, the motivation of the government in withdrawing its consent need not be resolved since the refusal of the Court to accept Russo's waiver, even without the consent of the government, was error.*

During the period of time that the written waiver and consent was being prepared,** the Court first informed the defense that a jury verdict in a federal criminal case must be unanimous and further, this requirement was jurisdictional and could not be waived. Judge Platt relied upon the text of Moore's Federal Practice, Volume 8A, and upon Apodaca v. Oregon, 406 U.S. 404 (1972),

There is substantial authority for the position that a federal jury verdict must be unanimous under the Sixth Amendment. Apodaca v. Oregon, 406 U.S. 404 (1972)***,

*For purposes of this argument it will be assumed that an accused has a right to a unanimous verdict. That, in the federal courts, this right is part of the Sixth Amendment right to a jury trial and further, that a waiver of unanimity falls within the ambit of Rule 23(a) of the Federal Rules of Criminal Procedure.

Moreover, while the right to a jury trial is of constitutional dimension, the right to a jury of twelve is not, Williams v. Florida, 399 U.S. 78, 100-103 (1970), and is purely statutory. Rule 23(b), F.R.Cr.P. Thus, the validity of the conditions placed upon the waiver of these two rights may be somewhat different. However, since here we are dealing with Russo's Fifth Amendment right not to be tried twice, the distinctions between the right to a jury and the right to a jury of twelve are not significant.

**A written consent and waiver was offered to Judge Platt, who felt that it needed to be typed or re-written.().

***In Apodaca, the five justice support for the requirement of unanimity in federal courts comes from the four dissenters, who felt that unanimity was required in both state and federal courts under Sixth Amendment and Fourteenth Amendments, and from the concurring opinion of Justice Powell who stated that unanimity was required under the Sixth Amendment in federal courts but not under the Fourteenth Amendment, which is applicable to the states. The four man "majority" held that unanimity is not required under the Sixth or the Fourteenth Amendments.

Andres v. United States, 333 U.S. 740, 748 (1948); See United States v. Maybury, 247 F.2d 899 (2d Cir. 1960); Torres v. Delgado, 510 F.2d 1182, 1183 (1st Cir. 1975); United States v. Jamison, 493 F.2d 823 (6th Cir. 1974), cert den 491 U.S. 847.

However, at issue here is not the correctness of Judge Platt's belief that unanimity is required in federal court but, that it could not be waived. The court did not predicate its belief on this issue on Apodaca, nor from the Supreme Court, but on Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953)* as cited in Moore's Federal Practice, Vol. 8A ¶31.02(1).

Research reveals no federal circuit case citing Hibdon with approval for the proposition that unanimity cannot be waived. In fact, the First Circuit indicated its disapproval of the reasoning of Hibdon on the issue of unanimity.

We do not have to quarrel with the result reached in Hibdon v. United States. All we need point out is that the second ground for the court's decision, if read literally, is wholly unsupported by authority, and seems to us to be patently erroneous...

Fournier v. Gonzalez, 269 F.2d 26,29 (1st Cir. 1959).

Moreover, Apodaca itself does not rely on Hibdon as authority either on the issue of unanimity or its waiver. The holding in Apodaca indicates that a majority of the Supreme Court felt that the right to a unanimous verdict is not so fundamental a right as to be necessarily incorporated as part of the Fourteenth Amendment. The Supreme Court has indicated the Sixth Amendment

* Interestingly the Court in Hibdon cited no case authority for the proposition that unanimity could not be waived. Moreover, the Court held that there was no waiver. Id. at 839

right to a jury trial is so fundamental that it is part of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). This fundamental right to a jury trial can be waived. F.R.Cr.P. Rule 23(b). Surely then, the right to a unanimous verdict can be waived as well.

Even assuming the extremely dubious proposition that an accused can not waive unanimity in the federal courts, the other two suggested procedures were proper and Russo's offer to accept a verdict under either procedure should have been approved by the Court.

Rule 23(a) permits a waiver of a jury trial. Thus, Judge Platt could properly have tried the case non-jury upon the understanding that he would rely upon the majority of the jury to decide the case.* So too, the procedure followed in United States v. Vega, 447 F.2d 698 (2d Cir. 1971)** was appropriate. F.R.Cr.P., Rule 23(b). In Vega, the jury was deadlocked at 11 to 1. The Court informed counsel of this and counsel consented to a jury of eleven. The dissenting juror was excused and a verdict was reached by the remaining eleven jurors. The Second Circuit upheld this procedure as a valid waiver of defendant's right to a jury of twelve under Rule 23(b) of the Federal Rules of Criminal Procedure.

Thus, Judge Platt had before him alternatives, any one of which would have led to a verdict. His failure to employ any of them was error.

* See, Rule 39(c), F.R.Cr.P. permitting the use of advisory juries.

**Vega has not been overruled or subsequently modified. Vega was cited with approval on the issue of the validity of the consent to a jury of less than twelve, United States v. Pacente, 503 F.2d 543, 552 (7th Cir. 1974) cert den. 95 S.Ct. 623.

Rule 23(a) provides:

Cases require to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and and the consent of the government.

Rule 23(b) provides:

Jury of less than twelve: Juries shall be of twelve but at any time before verdict the parties may stipulate in writing with approval of the court that the jury shall consist of any number less than twelve.

In Singer v. United States, 380 U.S. 24 (1965), the Supreme Court held that there was no constitutional impediment to conditioning a waiver of the right to a trial by jury on the consent of the prosecuting attorney and the trial judge, when the result of refusal to consent is simply that defendant is subject to an impartial trial by jury.

We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury--the very thing that the Constitution guarantees him.

380 U.S. at 36.

Singer also holds that the right to a jury trial does not imply a right to a bench trial. Faretta v. California, 422 U.S. 806, 819, n.15 (1975). Here, it is not asserted that Russo had a constitutional right to a bench trial, rather, that he had a right to have the case decided the first time around and that if this could only be accomplished by Russo waiving certain of his rights, the Court was obligated to accept those waivers, even

though the government did not consent.

Though the Sixth Amendment, in conferring upon a defendant the panoply of rights constituting a trial by jury, does not make specific reference to any such right to be conferred upon the government, the case law has recognized that the government has some interest, though considerably less than that of a defendant,* in the jury trial process. Thus, as explicated in Singer, supra, the government has an interest in seeing that facts are determined by the body deemed most appropriate by the Constitution.

This interest in assuring the integrity of the fact finding process by requiring a jury trial gives the government the right at the start of a trial to demand that a jury be impaneled rather than have the facts determined by the Court. However, even this interest is circumscribed to the extent that the government may not base its refusal to consent to a non-jury trial on any invidious reason and may not withhold its consent under circumstances where the defendant would be unfairly prejudiced. In sum, the government has a qualified right to require that the trier of fact be jury rather than judge.

Thus, it is clear, Singer does not hold that the government can withhold its consent under all circumstances.

...there might be circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the government's insistence on trial by jury would result in the denial to a defendant of an impartial trial.

Singer v. United States, supra at 37; See United States v. Kramer, 355 F.2d 891 (7th Cir. 1966), cert. den. in part and granted in part 384 U.S. 100.

* The right to a jury trial is "principally for the benefit of the accused." Patton v. United States, 281 U.S. 276, 312 (1930); Singer v. United States, supra at 33.

At issue here is not the government's right to demand a jury trial at the outset of the proceedings, but rather whether after full and fair trial of the issues to a jury which had deliberated upon the case, the government had a right to withhold the consent to the defendant's* acceptance of the majority of the jury's verdict, or his waiver of a jury trial, or his waiver of a jury of twelve.

It must be remembered, that the right of the government to a jury trial is based upon the government's interest that the case be decided by the trier of fact found most appropriate under the Constitution. Singer v. United States, supra. But here, the withholding of consent by the government did not further the reasons underlying the government's right to a trial by jury, since the case had already gone to the jury. Thus, the effect of the government's action was to prevent any verdict at all, since when the consent was withheld the possibility of obtaining a verdict was slim. Moreover, the government made it clear that it did not mind if the case was decided by the Court, rather the refusal to consent related solely to the propriety of the procedural devices to be used.**

* It must at all times be remembered that defendant's willingness to accept the majority's verdict was predicated solely upon his desire to avoid a second trial rather than upon any knowledge of how the jury stood. He acted at his peril solely because the anxiety of awaiting and enduring the first trial were overwhelming to him. In that regard, it should be noted that immediately after the declaration of the mistrial before Judge Platt the defendant begged through counsel to begin the re-trial the next morning rather than endure the incredible stresses and uncertainties of incarceration awaiting his second trial.

** "If it is lawful, your Honor, we will go for it." () Moreover, in light of the government's post mis-trial statement about needing time before the second trial to strengthen its case (), the possibility that consent was withheld by the government to gain an advantage cannot be disregarded.

Thus, the government's withholding of its consent in the circumstances of this case did nothing to further the public interest in jury as opposed to bench trials. The only result was that the defendant had to undergo a second trial. This was precisely the kind of prejudicial effect the court had in mind in Singer when it noted that the necessity of the government's consent to a waiver of a jury trial was not absolute. Rather all legitimate interests of the government, including the expense of re-litigation and the implementation of the policies underlying the double jeopardy clause, warranted the termination of the case upon the defendant's willingness to accept the majority's verdict.

In Singer, the accused's only stated reason for wishing to waive a jury trial was to save time. This was found to be an insufficient reason to have required the consent of the government* and the approval of the Court of the jury waiver. Here, the desire of the accused to not be twice tried presents a "compelling circumstance" such as to have required acceptance of the waiver.

It must also be remembered that no matter what interest the government has in a jury trial, Singer v. United States, supra, the right to a jury trial is "principally for the benefit of the accused." Patton v. United States, 281 U.S. 276, 312 (1930); Singer v. United States, supra at 33. So too, the double jeopardy clause is for the protection of the accused. See, United States v. Dinitz, 95 S.Ct. 1075, 1079 (1976). Thus, Russo's right to a jury trial, which was superior to the government's interest in such right,

*Here, no reasons were given by the government for its refusal to consent. In context though, it is sufficiently clear that the about face was a result of the Court's comments and, perhaps, a desire on the part of the government to obtain the opportunity to strengthen its case at the second trial ().

coupled with his right not to be tried twice for the same crime presented the court with a circumstance which compelled the acceptance of the waiver. To hold otherwise, would exalt the government's limited interest to a jury trial above the accused's superior interest in a jury trial, as well as above his unique interest in not being tried twice. In United States v. Joyce, 499 F.2d 9 (7th Cir. 1974) cert.den. 419 U.S. 1031, one of the two co-defendants wanted a bench trial, the other a jury trial. A motion for a severance on this ground was made. The Court held that the desire to avoid two trials was a valid reason for the government to withhold its consent. Here, the desire to avoid two trials was a valid reason to compel the government to consent.

Had it not been for the erroneous belief that the waiver was unlawful, the trial would have terminated in an acquittal. Under the circumstances presented here, the refusal to consent based upon an incorrect understanding of the law* cannot be held to have been valid, and accordingly, the failure to accept the waiver on that basis was impermissible and was error.

At the least, the Court was obligated to seek any appropriate means to avoid the necessity of a mistrial before declaring a mistrial. United States v. Grasso, - F.2d-, slip op. 2247, 2256 (2d Cir. 3/9/77). Here there were such appropriate alternatives and the refusal to implement any of them was error. This error denied Russo his "valued right to his trial completed by a particular tribunal" Wade v. Hunter, 336 U.S. 684,689 (1949).

*And where the defense agreed to affirmatively waive any rights which would work a possibility of an unfair advantage.

The failure of the Court to accept the waiver, thereby causing a mistrial, stands in the same position as any other erroneous granting of a mistrial. Further, a stringent test must be applied where, as here, the mistrial is declared sua sponte over the objection of counsel. See United States v. DiSilvio, 520 F.2d 247 (3d Cir. 1975) cert den. 96 S.Ct. 447. Such a grant of a mistrial will be held justified only if it meets the "manifest necessity test" of United States v. Perez, 9 Wheat (22 U.S. 579, 580 (1824)). United States v. Jorn, 400 U.S. 470, 485 (1971).

Here, where there were viable alternatives to the mistrial, there was no necessity, much less a "manifest necessity", and where the mistrial was granted solely for the benefit of the government*, Russo could not properly be retried. See, United States v. Glover, 506 F.2d 291 (2d Cir. 1974); United States v. Jorn, 400 U.S. 470 (1971); cf. Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Gentile, 525 F.2d 252 (2d Cir. 1975) cert. den. 425 U.S. 903; United States v. Estremera, 531 F.2d 1103 (2d Cir. 1976), cert. den. 96 S.Ct. 2184.

For the reasons stated above, the verdict of the jury should be set aside and the indictment dismissed.

*At the very least, for the benefit of neither side.

POINT II

THE GOVERNMENT'S USE OF PERJURED TESTIMONY AT TRIAL AND THE FAILURE TO PROPERLY DISCLOSE PRIOR TESTIMONY OF A WITNESS WAS ERROR AND REQUIRES REMAND FOR AN EVIDENTIARY HEARING.

The chief witness for the government was Michel Nicoli, a co-conspirator arrested in Brazil in November of 1972. He was thereafter expelled from Brazil and came to the United States, where he was placed under arrest on the basis of two pending federal indictments, one for possessing false documents and one for conspiracy to violate federal narcotics laws. Shortly thereafter, he decided that it was in his best interests to cooperate with, and become a witness for, the Government*. He was subjected to extensive debriefings by federal law enforcement officials and testified in front of several grand juries and at a number of trials. He was the sole witness to connect appellant Russo to this conspiracy.

It appears that Nicoli testified in front of the federal grand jury for the Eastern District of New York at least twice concerning the conspiracy that is the subject matter of this indictment. His first appearance was on February 15, 1973. He also testified later that same year** concerning a second indictment that involved the same defendants. 73Cr. 239.

The February 15, 1973 minutes of the grand jury established that Nicoli testified as follows concerning the pivotal February, 1968 transaction:

*He was, and still is, a fugitive from French authorities and has not been sent to France to face those charges.

**Counsel now possesses the February, 1973 grand jury minutes, but has no independent recollection of having been shown these minutes at either trial of appellant

- Q. During February of 1968 did you enter the United States at Miami, Florida in order to make preparations for this forty kilcgram delivery?
- A. Yes.
- Q. At that time were you stopped by Customs and questioned?
- A. Yes.
- Q. Shortly thereafter, did you depart from Miami to New York?
- A. Yes
- Q. Did you ultimately go back to South America without accomplishing anything?
- A. Yes.

Yet, at trial Nicoli testified in the following manner as to the same events:

- Q. What happened then?
- A. I took an airplane to go to New York. In New York I went to the apartment Florenzo Gonzales in the area of the Bronx, I met with Florenzo Gonzales, I explained to Florenzo what happened in Miami, and I asked Florenzo if he knew anybody who could go down to Miami to the McAllister Hotel.
- Q. For what purpose?
- A. In order to pick up the 3 kilos of heroin that the pilot was supposed to bring in.
- Q. What did Florenzo Gonzales say?
- A. Florenzo Gonzales made a phone call to a friend of his by the name of Papito.
- Q. Go ahead.
- A. And then Papito came over to the apartment, Florenzo Gonzales asked him if he could send anybody down to Miami to pick up the 3 kilos of heroin. Papito in fact sent somebody down to Miami, and then on the following day, this somebody came to the apartment of Florenzo Gonzales with the 3 kilos of heroin and then Florenzo Gonzales gave me approximately \$28,000. He gave me \$28,000 because he had to pay the man who had gone down to Miami to pick up the 3 kilos. Thereafter I left for Buenos Aires with the money.

(A).

Cleary, this was a flagrant perjury designed to avoid any Statute of Limitations problem in this prosecution. Also,

Russo. Counsel for co-appellant Chiappe, while making reference to the February appearance at page 461 of the trial transcript, only recollects receiveing the later grand jury minutes, which conformed to Nicoli's trial testimony, as 3500 material at the trial.

the government clearly had knowledge of this as the grand jury answer had been elicited in response to a question by an Assistant United States Attorney and the Government had possession of, and knowledge of the contents of, the grand jury minutes. Further, if the government ignored its responsibility under Brady v. Maryland, 373 U.S. 83 (1963), to disclose this evidence, which could have uncovered false testimony at trial, it was a due process violation. Giglio v. United States, 405 U.S. 150 (1971).

A. Nicoli's Perjury

The standard to determine whether perjury by itself requires a new trial is

...whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

United States v. Stofsky, 527 F.2d 237, 246 (2d. Cir. 1975).

Applying the foregoing, it is clear that the perjury had a critical impact on the factual elements of the case. If Nicoli had testified as he did before the grand jury, the government's case would have been dismissed for failure to initiate the prosecution within the statutory period. Nicoli's grand jury testimony—that there was no February, 1968 transaction—foreclosed the government from prosecuting this conspiracy, yet Nicoli's trial testimony conveniently included an overt act within the statutory period. Thus, the revelation of this perjury to the jury would "probably" have produced a different verdict. Stofsky, *supra*; See also, Larrison v. United States, 24 F.2d 82, 87 (7th. Cir. 1928).

B. Governmental Culpability

If the government intentionally withheld this useful information from the defense at trial, a reversal of the conviction is virtually automatic on due process grounds. See, e.g. Moore v. Illinois, 408 U.S. 786, 797-98 (1972); Giglio v. United States, supra; Napue v. Illinois, 360 U.S. 264, 269 (1959); United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), cert.denied 420 U.S. 962 (1975); Alcorta v. Texas, 355 U.S. 28 (1975).

Appellant can present no evidence that the failure to provide the February grand jury minutes was willful, although the documents were clearly in government possession and known to the government. Because of this, appellant requests that this Court remand the case for an evidentiary hearing as to the circumstances surrounding the disclosure of 3500 material, for even if the government's error was inadvertent or negligent the standard of review is still less than the "probability" test of Stofsky. The standard for inadvertent failure to disclose requires reversal if

there was a significant chance
that this added item...could
have induced a reasonable doubt
in the minds of enough jurors
to avoid a conviction.

United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975); United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied. 411 U.S. 982 (1973).

Furthermore, any suppression on the part of the government runs afoul of its independent responsibilities arising under Brady, supra., where the Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused" violates

due process "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

At the very least, the impeachment value of the grand jury testimony is substantial and, in a case resting solely on the credibility of a co-conspirator, should not be lightly treated. The Supreme Court has noted, in reversing a conviction because the defendant was prevented from revealing to the jury certain impeaching evidence. that depriving the jury of evidence relevant to a key government witness' credibility "would be constitutional error of the first magnitude..." Davis v. Alaska, 415 U.S. 308 (1974). This is what appellant fears has happened in the case at bar. Therefore, appellant requests that this Court remand for an evidentiary hearing to establish the cause of the government's failure, if any, to disclose the prior grand jury testimony of Nicoli which was in direct contradiction of his testimony at trial.

POINT III

PURSUANT TO RULE 28 (i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT HEREBY ADOPTS AND INCORPORATES BY REFERENCE ALL APPLICABLE ARGUMENTS RAISED BY CO-APPELLANT.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE RELIEF REQUESTED HEREIN SHOULD BE GRANTED.

Respectfully submitted,

NANCY ROSNER, ESQ.
Attorney for Appellant Russo

rosner

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of May, 19 77 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent served the within
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
6 day of May 197 7

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978